



**Republic v Mboya alias Obei (Criminal Case 44 of 2018)
[2022] KEHC 15781 (KLR) (23 November 2022) (Judgment)**

Neutral citation: [2022] KEHC 15781 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CRIMINAL CASE 44 OF 2018
KW KIARIE, J
NOVEMBER 23, 2022**

BETWEEN

REPUBLIC PROSECUTOR

AND

VINCENT OUMA MBOYA ALIAS OBEI ACCUSED

JUDGMENT

1. Vincent Ouma Mboya alias Obei is charged with an offence of murder contrary to section 203 as read with section 204 of the Penal Code.
2. The particulars of the offence are that on the 9th day of, July 2014, at Kokweno Oriang location, Karachuonyo North Sub County of Homa Bay County, jointly with another before court murdered Geoffrey Ouko Agaya.
3. The prosecution case is that the deceased was suspected to have stolen. The accused and other members of public beat him to death.
4. The accused pleaded an alibi and contended that on the material day he was helping a friend to erect a house.
5. The issues for determination are:
 - a. Whether the accused was at the scene of the incident or was elsewhere;
 - b. If he was, whether he was involved in the unlawful action against the deceased; and
 - c. Whether the offence of murder was established.
6. When an accused person pleads an alibi the onus is on the prosecution to disprove the same. This is even when this defence is raised for the first time while the accused is giving his defence. In the case



of *Victor Mwendwa Mulinge vs. Republic* [2014] eKLR the Court of Appeal rendered itself thus on the issue of alibi:

It is trite law that the burden of proving the falsity, if at all, of an accused's defence of alibi lies on the prosecution; see *Karanja V R*, [1983] KLR 501 ... this Court held that in a proper case, a trial court may, in testing a defence of alibi and in weighing it with all the other evidence to see if the accused's guilt is established beyond all reasonable doubt, take into account the fact that he had not put forward his defence of alibi at an early stage in the case so that it can be tested by those responsible for investigation and thereby prevent any suggestion that the defence was an afterthought.

7. The evidence that placed the accused at the scene of the incident at the time of the beating that subsequently led to the death of the deceased, is by Emily Akinyi Gaya (PW1), Florence Akelo Mimba (PW2), Ted Akoko Ayanga (PW3) and Collins Omondi (PW4). What did each say about the accused?
8. According to the narration of Collins Omondi (PW4), while he was at his Odok village home, he heard some people enquiring from his mother the whereabouts of Geoffrey the deceased herein. This was at about 7 a.m. Later this group of about nine people went to the house he shared with the deceased. They searched for the deceased and on failing to get him, they informed him that some items were missing from a video shop and the deceased was a suspect. When they were leaving, he heard them shout, "There he is". He followed them. They apprehended the deceased. The accused was one of the people in the group. They informed him that they were taking the deceased to the police.
9. After about 40 minutes, these people returned but in a larger group. They were with the deceased and Akoko. These two were injured. The accused continued to beat the deceased and at one stage he ran over the deceased with a motor cycle.
10. The mother of the deceased and Collins Omondi (PW4), testified like PW4 but according to her the first incident happened at 7 a.m. while the second occurred when the group returned to her home with the deceased, at about 10.a.m. She also testified to have identified the accused whom she said was Ombei.
11. In her evidence Florence Akelo Mimba (PW2), said that she was in her mother-in-law's home. She said the accused, whom she referred to as Ombei, was in the group. He assaulted the deceased together with the others.
12. Ted Akoko Ayanga (PW3) was one of the victims of the mob beating together with the deceased. His evidence was that the accused was one of the assailants. He identified him as Ombei.
13. An issue was raised during defence on the identity of the accused. The witnesses testified that they came from the same area and knew his as Geoffrey Mboya alias Ombei. It is not uncommon for a person to be known to his fellow villagers differently from his/her official name. I am satisfied that the person who the witnesses said was called Ombei was a person known to them very well. The issue of identity therefore does not arise.
14. The alleged house of Lameck Amadi Nyagelo (DW2) which was being erected may have been a fictitious one. According to DW2, it was a two roomed house while the accused and Fredrick Otieno Okello (DW3) testified that it was four roomed.
15. I therefore find that the prosecution has adduced evidence that displaced the alibi defence of the accused.



16. All the witnesses present testified of the involvement of the accused in beating up the deceased and Ted Akoko Ayanga (PW3). The evidence of PW3 was that after the two were arrested, they were taken to the home of the deceased.
17. In order to found conviction on the evidence on record, the prosecution must prove the existence of malice aforethought. In Black's Law dictionary, 10th Edition malice aforethought is defined as:
The requisite mental state for common-law murder, encompassing any one of the following (1) the intent to kill (2) the intent to inflict grievous bodily harm (3) extremely reckless difference to the value of human life (the so-called "abandoned and malignant heart"), or (4) the intent to commit a dangerous felony (which leads to culpability under the felony-murder rule).
- Section 206 of the Penal Code gives instances when malice aforethought may be proved. It provides:
Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances—
- (a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;
 - (b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;
 - (c) an intent to commit a felony;
 - (d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.
18. Citizen arrest is recognized by the law as long as it is executed with minimum force and the suspect handed over to the law enforcement agencies. It is also limited so as to curb the possibility of the citizenry taking the law into their own hands as happened in this case.
19. The initial intention was probably lawful had the deceased and the other suspect been handed over to the requisite authority. It however became illegal when they meted out the beatings. The subsequent death was not therefore premeditated. I therefore, find that the prosecution has not proved the offence of murder against the accused person. However, the prosecution has proved beyond any reasonable doubt the lesser offence of manslaughter. I accordingly reduce the charge of murder to that of manslaughter. I acquit the accused of the charge of murder. I however find him guilty and convict him of them of the offence of manslaughter contrary to section 202 as read with section 205 of the [Penal Code](#).

Delivered and signed at Homa Bay this 23rd day of November, 2022

KIARIE WAWERU KIARIE

JUDGE

